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March 8, 2000

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: Federal-State Joint Board on Universal Service,  
CC Docket No. 96-45

Dear Ms. Salas:

The Competitive Universal Service Coalition ("CUSC") made two *ex parte* presentations today regarding the proceeding referred to above: (1) to Carol Matthey, Deputy Chief, Common Carrier Bureau ("CCB"); Jack Zinman, Counsel to the Chief, CCB; and Irene Flannery, Chief, Accounting Policy Division, CCB; and (2) to David Furth, Associate Chief, Wireless Telecommunications Bureau ("WTB") and Steven Weingarten, Chief, Commercial Wireless Division, WTB. Thomas Curran of Bell Atlantic Mobile, Jim Blundell of Western Wireless, and Michele Farquhar and I, counsel for CUSC, participated in these presentations on behalf of CUSC. The presentations covered issues described in the attached handouts, which were used during the meetings.

Respectfully submitted,



David L. Sieradzki  
Counsel for the Competitive Universal  
Service Coalition

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Enclosures

cc: Carol Matthey  
Irene Flannery  
Jack Zinman  
David Furth  
Steven Weingarten

# COMPETITIVE UNIVERSAL SERVICE COALITION

## Core Principles of the Competitive Universal Service Coalition

The Competitive Universal Service Coalition urges reform of the universal service system in a manner that is consistent with the following principles:

- **DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS CARRIERS:** Competitive common carriers seeking designation as an ETC should not be subject to discriminatory and unlawful requirements. The criteria used to evaluate an application for ETC status must be consistent with applicable law and regulation. In particular, the federal requirements are the only requirements that should be imposed on a carrier seeking eligibility for federal universal service funding. All common carriers must be subject to the same procedural requirements applicable to ETC applications, which should be processed in an expeditious and fair manner.
- **COMPETITIVE NEUTRALITY:** Any common carrier, regardless of technology, that offers the required universal services and complies with all applicable requirements should be designated as an ETC for purposes of federal and state universal service support.
- **EXPLICIT SUPPORT:** Universal service support should be available to ETCs through an explicit universal service fund and should not be hidden in the rate structures of incumbent LECs and, therefore, unavailable to competitive ETCs. Universal service support levels should be sufficient and no greater than necessary to ensure that customers in high-cost areas have access to affordable telecommunications services and carriers have incentives to provide service in high-cost areas.
- **PORTABILITY:** Universal service should be portable among ETCs. Competitive ETCs should receive the same level of universal service support for serving a customer as the incumbent LEC would receive for serving the same customer.
- **EFFICIENT UNIVERSAL SERVICE SYSTEM:** Universal service programs should be fiscally prudent and as targeted as possible to carriers serving consumers in high-cost areas, by such measures as calculating the amount of support based on the most efficient technology.

### THE COMPETITIVE UNIVERSAL SERVICE COALITION

AirTouch Communications  
Association for Local Telecommunications Services  
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Dobson Communications Corporation  
McLeodUSA Telecommunications Services, Inc.  
Personal Communications Industry Association  
Smith Bagley, Inc.  
Sprint PCS  
U.S. Cellular Corporation  
VoiceStream Wireless Corporation  
Western Wireless Corporation

# **COMPETITIVE UNIVERSAL SERVICE COALITION**

March 8, 2000

Chairman William E. Kennard  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**Re: Request for Expedited Action To Facilitate Designation  
of Competitive Eligible Telecommunications Carriers;  
CC Docket No. 96-45**

Dear Chairman Kennard:

The Competitive Universal Service Coalition ("CUSC") calls upon the Commission to take action expeditiously to open the process of designating competitive carriers as Eligible Telecommunications Carriers ("ETCs") for federal universal service funding.

Specifically, the process of designating ETCs must be clear, expeditious, competitively neutral, and non-discriminatory, and all telecommunications carriers that meet the statutory and applicable regulatory requirements must promptly be designated as ETCs. In this letter, we discuss: (1) the reasons why immediate Commission action is needed; (2) the legal basis for the Commission to exercise jurisdiction; (3) existing proceedings that are now ripe for resolution and that the Commission could use to establish pro-competitive precedent; and (4) specific policy issues raised in those proceedings. CUSC calls upon the Commission to clarify the procedures for ETC designation, the substantive standards that should be applied, and specific matters regarding additional carriers in rural telephone company areas.

**Introduction.** CUSC includes competitive local exchange carriers ("CLECs"), wireless carriers, and other new entrants that are eager to compete with incumbent local exchange carriers ("ILECs") in providing residential customers the services supported by the Commission's universal service programs. These services include basic service in high-cost, rural, and underserved areas, as well as service to low-income households.

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But prospective new entrants cannot even begin the process of competing to provide supported universal service until they can be designated as ETCs pursuant to Section 214(e) of the Communications Act of 1934, as amended ("Act"). The process of designating new entrants as ETCs is badly broken, and is in serious need of repair. Swift, targeted action by the Commission could help unblock the designation process.

**1. The Need for Action.** Expeditious FCC action to facilitate the designation of competitive ETCs is needed *now*, for three reasons:

*First*, one of the Commission's highest priorities is to close the "digital divide" between Americans that have access to advanced telecommunications services and those who lack such access. Yet many Americans – particularly those living in rural, high-cost, and underserved areas, as well as members of low-income households – lack access to competitive *basic* services. These consumers either cannot obtain basic services at all, or can only get them from monopoly carriers that lack incentives to offer attractive rates, diverse choices of service packages, and innovative technology. Under the Telecommunications Act of 1996, the clearest way to bridge this gap is by opening up the universal service marketplace to competition. Unblocking the ETC process would clear the starting gate for competitive entry.

*Second*, confusion and lack of certainty regarding the ground rules for designating competitive ETCs continue to impede competitive entry. Although a few state commissions have designated prospective entrants as ETCs, others have rejected ETC applications, or have limited ETC designations to areas where no universal service funding is available. Worse, many other state commissions have delayed consideration of or action on competitive entrants' ETC applications by as long as a year and a half. Such delays are unfair and function as barriers to entry, especially given that almost all of the ILECs received ETC status through expedited processes that took no more than a few months. A recent decision of the U.S. Court of Appeals for the Fifth Circuit (discussed at greater length below) adds to the uncertainty. The FCC should take action to resolve the uncertainty, eliminate the confusion, and unblock the designation process.

*Third*, delays in proceedings at the FCC exacerbate the problem. Several competitive carriers' requests for ETC designation from the FCC have been pending, with no action, for as long as nine months. The FCC should set an example for the states by processing these ETC applications, and resolving related

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proceedings addressing ETC issues, rapidly and without excessive procedural delays. We enumerate these proceedings in part 3 of this letter, below.

**2. Legal Analysis.** The Commission has the authority and the responsibility to adopt rules and policies clarifying the procedures and substantive rules governing the designation of ETCs for purposes of federal universal service support. The Commission has preeminent authority over the federal universal service program, and the grants of authority under Sections 214(e) and 254 empower it to act decisively to coordinate and establish a universal service program and an ETC designation process. The Commission's authority also derives from Section 201(b) of the Act, which provides that "the Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." Last year's Supreme Court decision in *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721 (1999), strongly supports this proposition, as discussed below.

The Fifth Circuit's decision in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*Texas OPUC*"), regarding state commission adoption of additional ETC criteria created significant uncertainties regarding federal universal service policy. In *Texas OPUC*, the Fifth Circuit reversed the Commission's decision that Section 214(e)(2), by its terms, unambiguously bars state commissions from imposing additional ETC criteria besides those specified by Section 214(e)(1). 183 F.3d at 417-19. The court held that, contrary to what the FCC had concluded in the First Report and Order in the Universal Service proceeding, the statute was not clear on this point. The court stated, "[n]othing in the statute . . . speaks at all to whether the Commission may prevent state commissions from imposing additional criteria on eligible carriers." *Id.* at 418 (footnote omitted).

But it is critical to keep in mind what the Fifth Circuit did *not* say. The court expressly declined to disturb the Commission's jurisdiction to adopt rules and policies governing the designation of ETCs. The court did *not* hold that the statute unambiguously *allows* state commissions to adopt additional ETC criteria. Nor did the court even suggest that there are limits on the Commission's authority to act in this area. Instead, the court expressly declined to address the petitioners' argument that the Commission lacked jurisdiction in this area. *Id.* at 417-18.

The Fifth Circuit decision also must be read in conjunction with the recent Supreme Court decision in *AT&T v. Iowa Utilities Board*. In that case, the Supreme Court upheld the Commission's authority under Section 201(b) to adopt

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rules and policies to implement even those sections of the federal Act that states are directed to implement. 119 S.Ct. at 730. While *AT&T v. Iowa Utilities Board* related to the standards for arbitration of interconnection disputes under Section 252 of the Act, its rationale applies with equal force to the designation of ETCs under Section 214(e). As with Section 252, which directs state commissions to arbitrate and approve interconnection agreements pursuant to standards specified in the *federal Act*, Section 214(e) directs state commissions to designate ETCs for participation in the *federal* universal service program pursuant to standards prescribed in the *federal Act*. Therefore, as with the Commission's rules and policies guiding state commission interconnection arbitration, Section 201(b) empowers the Commission to adopt rules and policies guiding state-commission designations of ETCs for the federal program

Indeed, if anything, the Commission's jurisdiction to act in this area is strengthened by the Fifth Circuit's decision that Section 214(e)(2) is *ambiguous* on the issue of whether state commissions may impose additional requirements or criteria when designating ETCs for purposes of federal universal service support. It is well established that administrative agencies have wide latitude to adopt rules and policies clarifying ambiguous provisions in their organic statutes, and that reviewing courts must accord significant deference to such decisions. *See, e.g., Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Thus, it is clearly within the Commission's purview to adopt rules or policies governing the procedural and substantive standards governing the designation of ETCs for the federal universal service program. Moreover, such action is imperative to fully and properly implement Section 214(e).

**3. Existing Proceedings Presenting ETC Issues.** Fortunately, a number of existing proceedings, each with complete records, give the Commission ample opportunities to establish strong precedent favoring rapid designation of competitive ETCs. Expedited resolution of some or all of these proceedings would remove the current regulatory uncertainty, which delays or prevents new entrants from being designated as ETCs and, in turn, forestalls the advent of competition in high-cost and rural areas. Specifically, a number of ETC issues are raised in the main universal service proceeding (CC Docket No. 96-45), including:

- the September 1999 NPRM on promoting deployment and subscribership in unserved and underserved areas, including tribal and insular areas; and

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- the October 1998 NPRM seeking comment on rule changes needed to facilitate provision of universal service by wireless carriers, cable operators, and other eligible providers.

In addition, ETC issues are presented for decision in two pending petitions for preemption pursuant to Section 253 of the Act, and four pending petitions for designation as ETCs pursuant to Section 214(e)(6) of the Act:

- Western Wireless' petition for preemption of the South Dakota PUC order denying it ETC status;
- Petitions for preemption of an Arkansas statute filed by MCI and ACSI (now e.spire);
- Bell Atlantic Mobile's (a/k/a Cellco) petition for designation as an ETC in Delaware and Maryland;
- Western Wireless' two separate petitions for designation as an ETC in Wyoming, and on the Crow reservation in Montana; and
- Smith Bagley, Inc.'s petition for designation as an ETC in Navajo and other Native American lands in Arizona and New Mexico.

**4. ETC Issues To Be Resolved.** The Commission should proceed expeditiously to resolve the issues listed below, each of which has been squarely presented to the Commission in one or more of the proceedings listed above. These issues are ripe for resolution. In some instances, FCC action is all that stands between a competitive carrier and ETC designation. It is imperative that the Commission break the logjam and provide regulatory clarity on these matters so that competitive ETC designations can proceed apace. The issues most in need – and most ready – for expeditious resolution are listed in the following outline. (In addition, the attached matrix shows which of the pending proceedings raise each of these issues.)

I. The FCC should clarify the *procedures* by which ETCs are designated.

- The procedure for designating carriers as ETCs should be expeditious. If a state commission (or the FCC) does not act on a pending petition within a reasonable period of time (e.g., 90 days), the petition should be deemed granted.



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- To ensure competitive neutrality, the procedure for designating carriers as ETCs must be identical for incumbents and new entrants in non-rural telephone company service areas. For example, if ILECs are able to self-certify that they meet the criteria for ETC designation, then competitive carriers should likewise be able to self-certify. If ILECs need only make a bare-bones filing showing satisfaction of the ETC criteria, which is then rubber-stamped by the state, competitive carriers should not be subjected to years-long full adjudications with extensive evidentiary procedures.
- Competitive ETCs' designated service areas, within which ubiquitous service is required under Section 214(e)(5), may be larger or smaller than those of the ILECs, and need not be identical to those of the incumbents.
- The FCC has jurisdiction under Section 214(e)(6) to designate any common carrier that is not subject to state commission jurisdiction as an ETC. The lack of state commission jurisdiction can be established by state commission action, state statutes or rules stating that the state commission lacks jurisdiction, or practices and procedures that evidence lack of jurisdiction.

## II. The FCC should clarify the *substantive requirements* for ETC designation.

- There should be no additional criteria for designating ETCs besides those set forth in Section 214(e) of the Act and the FCC rules implementing that provision (*i.e.*, 47 C.F.R. § 54.101(a)). Non-operative terms in Section 254 are not ETC criteria, and states should not be allowed to impose additional criteria when designating carriers for purposes of federal universal service support.
- Applicants need not already be ubiquitously providing universal service to be designated as ETCs, nor must ETC applicants demonstrate an absence of "gaps" in their service areas to be designated. Requiring ubiquitous service prior to designation would have the effect of guaranteeing that only ILECs could ever obtain ETC status. Rather, once a carrier receives ETC designation, it becomes responsible for offering service throughout the service area for which designation is received.
- The rates, terms, and conditions of service (*e.g.*, whether a carrier provides service subject to state-regulated tariffs or is exempt from such regulation), and the specific equipment used to provide service, are *not* relevant ETC criteria. Rather, the *only* relevant issue should be whether the applicant provides the supported services. (There is no legal basis for abuse of the ETC

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designation process to impose regulation on deregulated carriers, nor is there any need to do so. A competitive entrant that fails to offer an attractive universal service package will not gain customers, and thus will not receive any funding.)

- Carriers offering a variety of service plans should be eligible for ETC designation, and there should be no minimum quantity of local usage in competitive carriers' service plans. Any such requirement would violate competitive neutrality because it would be inherently biased against carriers with usage-sensitive cost structures, such as wireless carriers. Nor should there be any data rate requirement for ETC designation.
- Under the principle of competitive and technological neutrality, there must be no requirement that wireless services be "fixed" or "semi-fixed" in order to qualify for ETC status. Rather, any carrier providing the enumerated services and functionalities must be eligible for universal service support.

III. The FCC should clarify the *public interest requirements* that apply to designating ETCs in *rural telephone company* areas.

- There must be no "public interest" inquiry for areas not served by rural telephone companies. Section 214(e)(2) provides for a special public interest inquiry for areas served by rural companies, but it makes no sense to apply that special inquiry in other areas, where the statute directs that multiple carriers "shall" be designated.
- The public interest inquiry for additional ETCs in rural telephone company service areas should focus on the consumer. The issue is *not* the impact on the rural telephone company or competitive carrier, but whether the designation of an additional ETC is in the consumer's best interests.

It is imperative that the Commission resolve the issues listed above expeditiously and definitively. Only by doing so will the Commission ensure that consumers in high-cost and rural areas, as well as low-income households, receive the benefits of local competition. In addition, the FCC's adoption of these pro-competitive principles will establish a model for the state commissions to follow.

**Conclusion.** CUSC strongly urges the Commission to proceed rapidly to adopt a pro-competitive resolution to the ETC issues raised in pending proceedings. This is the best way to advance the Commission's goals of

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simultaneously promoting universal service and competition, to the benefit of consumers throughout the nation.

Respectfully submitted,

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Smith Bagley, Inc.  
Sprint PCS  
U.S. Cellular Corporation  
VoiceStream Wireless Corporation  
Western Wireless Corporation

ccs: Commissioner Susan Ness  
Commissioner Michael Powell  
Commissioner Harold Furchtgott-Roth  
Commissioner Gloria Tristani  
Lawrence Strickling, Chief, Common Carrier Bureau  
Magalie Roman Salas, Secretary

ISSUE	WW Crow ETC Pet.	Smith Bagley ETC Pet	WW Wyo. ETC Pet.	BAM ETC Pet.	WW S.D. Pre- empt	MCI/ ACSI Ark. Prmpt	Tribal FNPRM, Generic Rulemkg
<b>PROCEDURES FOR DESIGNATING ETCs</b>							
State commission (and FCC) procedures for designating incumbents and new entrants must be identical.	x	x	x	x		x	x
The FCC should rule that, if states have failed to address ETC applications within a certain amount of time, the applications are deemed granted.							x
<b>SUBSTANTIVE ETC CRITERIA</b>							
Applicants need not already be ubiquitously providing universal service to be designated as ETCs.	x	x	x	x	x		x
ETC applicants need not demonstrate the absence of "gaps" in their service areas to be designated as ETCs.	x	x	x	x	x		x
The FCC should not allow states to adopt additional ETC criteria for federal support.					x	x	x
ETC applicants need only satisfy § 214(e) criteria; non-operative terms in § 254 are not ETC criteria	x	x	x	x	x		x
The issue is whether the ETC provides the supported services; the specific equipment used to provide service and the rates, terms, and conditions of service are <i>not</i> relevant criteria for consideration.	x		x	x	x		x

ISSUE	WW Crow ETC Pet.	Smith Bagley ETC Pet	WW Wyo. ETC Pet.	BAM ETC Pet.	WW S.D. Pre- empt	MCI/ ACSI Ark. Prmpt	Tribal FNPRM, Generic Rulemkg
Neither minimum local usage, nor criteria relating to data rates, should be prescribed as ETC requirements. All criteria must be competitively neutral.	x		x	x		x	x
Competitive ETCs' designated service areas need not be identical to those of the incumbents.		x	x				x
<b>PUBLIC INTEREST INQUIRY IN RURAL TELCO AREAS</b>							
The public interest inquiry for additional ETCs in rural telephone company service areas should examine not "bottom line" harm to rural telcos, but rather the potential benefits and harm to consumers.	x	x	x			x	x
There is no public interest inquiry for areas not served by rural telephone companies.		x	x	x		x	x
<b>214(e)(6) JURISDICTIONAL ISSUES</b>							
The FCC has jurisdiction over non-tribally-owned carriers targeted to reservations.	x	x					x
The FCC has jurisdiction where state statutes deprive state commissions of authority over a class of carriers.			x	x			x

**ETC Petitions of Wireless, Cable, and Selected CLECs**  
**Granted Or Denied By State Commissions**

State	Company	Status
Arkansas	Sprint PCS	Granted
California	Cox Cable	Granted
California	Sprint PCS	Granted
Kansas	Sprint PCS	Granted (non-rural telco areas only)
Kansas	Western Wireless	Granted (non-rural telco areas only)
Maryland	MCI	Granted
Minnesota	Western Wireless	Granted
North Dakota	Western Wireless	Granted (non-rural telco areas only)
Puerto Rico	Centennial Cellular	Granted
South Dakota	Western Wireless	Denied (FCC preemption requested)
Washington	U.S. Cellular	Granted
Wisconsin	Wausau Cellular	Granted
Wyoming	Western Wireless	Dismissed on jurisdictional grounds

**Competitive Carriers' Pending Petitions**  
**for Designation as ETCs by the FCC**

State	Company	Status
Arizona/New Mexico Indian Reservations	Smith Bagley, Inc.	Pending
Delaware/Maryland	Bell Atlantic Mobile	Pending
Montana – Crow Reservation	Western Wireless	Pending
Wyoming	Western Wireless	Pending